

# SPEECH OF HON. E. B. GARY.

Continued from First Page.

In this discussion the carriage tax played a conspicuous part.

To the foregoing list may be added the case of *Kirby vs. United States*, thereafter decided, in which the Court held, that so much of the Act of Congress of March 3, 1875, as provides that the judgment of conviction against the principal, in the crime of embezzlement or larceny of property of the United States, shall be evidence against a receiver thereof, that the property was embezzled or stolen, is in violation of the Sixth Amendment of the Constitution, declaring that one accused, shall be confronted with the witnesses against him; also the case of *Fairbank vs. United States* 21, Sup. Ct. 649, in which the Court in an exceedingly elaborate opinion held "that a stamp tax on a foreign bill of lading, is in substance and effect, equivalent to a tax or duty on exports, and in conflict with the constitutional prohibition."

There are four cases that stand out in bold relief, as showing that the Supreme Court refused to reflect in its decisions the bitterness and hatred against the South, just after the war.

They are both entertaining and instructive, but it would prolong our remarks, to too great a length, to discuss them. We, however give the names of them; they are *Milligan's case*, 4 Wall 2; *Ex Parte Garland* 4, Wall 333; *Cummings vs. Missouri*, 4 Wall 277, and *United States vs. Lee*, 106, U. S. 106.

In a recent decision of the Supreme Court of the United States is quite an interesting discussion as to how far the principles of the common law are applicable to cases arising under the Constitution and Acts of Congress.

The Court after quoting the following language from *Smith vs. Alabama*, 124 U. S. 465, to wit:

"There is no common law of the United States in the sense of a national customary law distinct from the common law of England as adopted by the several states, each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. *Wheaton vs. Peters*, 8 Pet. 591, 8 L. ed. 1055. A determination in a case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction where they are called upon to administer the law of the state in which they sit, or by which the transaction is governed, exercise an independent though concurrent jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of *New York C. R. Co. v. Lockwood*, 17 Wall, 557, 21 L. ed. 627, where the common law prevailing in the state of New York in reference to the liability of common carriers for negligence received a different interpretation from that placed upon it by the judicial tribunals of the state; but the law as applied is none the less the law of that state."

"Properly understood, no exceptions can be taken to declarations of this kind. There is no body of Federal common law separate and distinct from the common law existing in the several states, in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several states. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress."

What is the common law? According to Kent: "The common law includes those principles, usages, and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature." 1 Kent, Com. 471. As Blackstone says: "Where it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority; and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this Kingdom. This unwritten, or common law, is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole Kingdom, and form the common law, in its stricter and more usual signification." 1 Bl. Com. 67. In Black's Law Dictionary, page 232, it is thus defined: "As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England."

Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment. \* \* \*

Reference may also be made to the elaborate opinion of District Judge Shiras, holding the circuit court in the northern district of Iowa, in *Murray v. Chicago & N. W. R. Co.* 62 Fed. Rep. 25, in which is collated a number of extracts from opinions of this court, all tending to show the recognition of a general common law existing throughout the United States, not, it is true, as a body of law distinct from the common law enforced in the states, but as containing the general rules and principles by which all transactions are controlled, except so far as those rules and principles are set aside by express statute."

By the Judiciary Act it is provided that "the trial of issues of fact in the Supreme Court in all actions at law against citizens of the United States, shall be by jury." The first jury trial in that Court, was in the case of the State of Georgia v. Brailsford 1 Dallas 1. The Chief Justice and all the Justices were on the bench; Chief Justice Jay, as the organ of the Court charged the jury in a manner that now-a-days seems strange as follows: "It may not be amiss here, gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury on questions of law, it is the province of the Court to decide. But it must be observed, that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves, to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt you will pay that respect which is due to the opinion of the Court; for, as on the one hand it is presumed that juries are the best judges of facts, it is, on the other hand, presumable that the Court are the best judges of law. But still, both objects are lawfully within your power of decision."

I shall not consume your time by suggesting rules by which you should be governed in the practice of your profession, but as a Code of legal ethics of special merit I venture to commend to you the oath taken by the Geneva advocate on admission to practice, to-wit:

"I solemnly swear before Almighty God to be faithful to the republic and the canton of Geneva; never to depart from the respect due to the tribunals and authorities; never to counsel or maintain a cause which does not appear to be just or equitable, unless it be the defense of an accused person; never to employ knowingly, for the purpose of maintaining the cause confided to me, any means contrary to truth, and never seek to mislead the judges by any artifice or false statement of fact or law; to abstain from all offensive personality, and to advance no fact contrary to the honor or reputation of the parties, if it be not indispensable to the cause with which I may be charged; not to encourage either the commencement or continuance of a suit from any motive of passion or interest; not to reject for any consideration personal to myself the cause of the weak, the stranger, or the oppressed."

In conclusion in the language of another let me say: The Anglo-Saxon lawyer, in his inmost heart, a patriot. His blood has been a crimson sacrifice for freedom, on many a battlefield. His hand has held aloft his country's flag in many an hour of deepest danger. His history in this; that he has stood for law and liberty, as against the more insidious perils of velvet despotisms, usurping forbidden powers in the name of law, and under the protection of the flag.

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